

GAHC010143902022



2024:GAU-AS:13079

THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 144/2022

Shri Tapan Kachari,
Aged about 46 years,
S/o Late Numal Kachari,
R/O- Bordirak Gaon,
P.S.- Kakopathar,
District- Tinsukia, Assam.

.....Accused Appellant.

-Versus-

1. The State of Assam,
Represented by its Public Prosecutor.

2. Smti Indira Sonowal
W/o Sri Robin Sonowal,
R/o Bordirak Gaon,
P.S.- Kakopathar,
District- Tinsukia, Assam,
PIN - 786152.

.....Respondents.

Advocates for the appellant : Mr N Hasan,
Advocate for the respondents: Ms S Jahan, APP, Assam,
Ms J Das, LAC, R-2.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 26.09.2024

Date of Judgment : 18.12.2024

JUDGEMENT AND ORDER (CAV)

Heard Mr N Hasan, learned counsel for the appellant, Ms S Jahan, learned Additional Public Prosecutor for the respondent No. 1/State and Mr J Das, learned Legal Aid Counsel for the respondent No. 2.

2. This appeal is directed against the Judgment and Order dated 25.05.2022, passed by the learned Additional Sessions Judge-cum- Special Judge, POCSO, Tinsukia, in connection with POCSO Case No. 65(T)/2018, convicting Sri Tapan Kachari (hereinafter, referred to as the appellant or the

accused) under Section 6 of the POCSO Act, and sentencing him to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 20,000/-, with default stipulation.

3. The genesis of the case was that the appellant has been committing rape on the minor victim-‘X’, who was only 15 years old.

4. It is further alleged that the appellant committed sexual assault on the victim from time to time and impregnated her. When the victim’s elder sister visited her parental home, she noticed the appearance of the victim and confronted her and then it was unearthed that the appellant committed sexual assault on the victim and he threatened her not to disclose the incident, lest she would face dire consequences. An FIR (ejahar) regarding this incident was lodged on 09.12.2018, by the victim’s mother-‘Y’, which was registered as Kakopathar PS Case No. 66/2018, under Section 376 (3) of the Indian Penal Code, 1860 (IPC, for short), read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, for short).

5. The Investigating Officer (IO, in short) embarked upon the investigation. He forwarded the victim for medical examination and for

recording her statement under Section 164 of the Code of Criminal Procedure, 1973 (CrPC, for short). He recorded the statement of the witnesses and on finding sufficient materials against the appellant, submitted charge sheet against him under Sections 376 (3) IPC, read with Section 6 of the POCSO Act.

6. At the commencement of trial, a formal charge under Section 6 of the POCSO Act was framed, read over and explained to the appellant, who abjured his guilt and claimed innocence. To substantiate its stance, the prosecution adduced the evidence of 6 witnesses, including the Medical Officer (MO, for short) and the IO and exhibited several documents. The witnesses were cross-examined in extenso, to refute the charges. The appellant did not tender any evidence in defence. On the incriminating materials projected by the prosecution, several questions were asked to the appellant under Section 313 CrPC. The tone and tenor of the answers of the appellant to the questions under Section 313 CrPC, depicts a plea of total denial.

7. The learned counsel for the appellant laid stress in his argument that the birth certificate was procured few months prior to the incident without

following the proper procedure of law and this birth certificate cannot be accepted as evidence. The evidence of the witnesses are contradictory as PW-2 has stated that her daughter has given birth to a girl child, whereas the victim mentioned in her cross-examination that she gave birth to a boy, who was later given in custody of some other person.

8. It is further submitted that the victim was a consenting party and she was not a minor at the time of the incident. The procured birth certificate fails to prove that the victim was a minor at the time of the incident, but the learned trial Court ignored the fact that the victim was a consenting party. The victim kept her entire family in the dark about her relationship with the appellant. Moreover, the appellant has denied his paternity. It is submitted that the appellant is a married man and is related to the victim. It is submitted that the appellant is the first cousin of the victim and the DNA test was a *sine qua non* as the appellant has denied the paternity of the child. This case is fraught with discrepancies as neither the age of the victim could be ascertained nor the sex of the child could be ascertained. On this ground alone, the appellant deserves a benefit of doubt.

9. Learned Additional Public Prosecutor, Ms S Jahan, has laid stress in her argument that this case has been correctly decided by the learned trial Court.

The married cousin of the victim, a father of four children at the time of the incident, committed repeated sexual assault on the victim. The victim kept mum about the incident as she was under threat. The evidence of the victim clearly discloses that she was forbidden from divulging about the sexual assault. The appellant threatened her with dire consequences.

10. Learned Additional Public Prosecutor also laid stress in her argument that no objection was raised when the birth certificate was proved as M.Ext.1 and at this stage, the birth certificate cannot be disputed.

11. The remaining part of the argument of the learned counsel for the appellant, the learned Additional Public Prosecutor and the learned counsel for the respondent No. 2, will be discussed at the appropriate stage. The decision of the learned trial Court is based on the evidence of the victim as well as the provisions of Section 29 and 30 of the POCSO Act. It was held by the learned trial Court that-

“In this case the entire evidence on record does not disclose any motive on the part of the victim to falsely implicate the accused. The fact of the accused being the cousin of the victim, the inherent bashfulness of the victim she being a minor girl of a traditional rural society, her innocent naivete and the usual pressures on women in our traditional society are some of the relevant factors which improbabilise the hypothesis of false implication in this case. Taking note of all these factors I find no reason to disbelieve the evidence of the victim

in this case. Her evidence is inherently probable, consistent and firm. Such probable and cogent evidence inspires credence.”

12. Now, the question that falls for consideration is, whether the learned trial Court has erred by convicting the appellant under Section 6 of the POCSO Act?

13. To decide this case in its proper perspective, the evidence is re-appreciated.

14. The informant-‘Y’ deposed as PW-2 that the appellant is her nephew as he is the son of her husband’s elder sister. Her daughter’s age at present is 16 years. She has proved the birth certificate as M.Ext-1, which reveals that her daughter’s date of birth is 17.04.2003.

15. PW-2 further deposed that in the previous year, in the month of December, she noticed her daughter’s bulging abdomen and got her urine examined and her pregnancy was confirmed. She then confronted her daughter, who informed her that the appellant had impregnated her (X). Her daughter informed her that whenever she (PW-2) use to go out of the house, the appellant used to visit her and indulge in physical relationship with her. On multiple occasions, the appellant had sexual intercourse with her

daughter (X). PW-2 further deposed that she lodged the FIR with the Police. The FIR was written by Hemanta Saikia and she affixed her thumb impression on the FIR. The FIR was written according to her narration and the contents were read over to her on two occasions. The Police came to their house and recorded her daughter's statement and forwarded her for medical examination. She accompanied her daughter to the hospital. Her daughter was forwarded to the Magistrate, who recorded her statement on 30.03.2019. Her daughter gave birth to a still-born baby girl.

16. In sync with the evidence of PW-2, the victim-'X' deposed as PW-3 that the appellant is her aunt's son. The incident occurred during the previous summer. Her parents used to go out for work in the morning and return in the evening and she used to stay alone in the house. The appellant frequently used to visit her during that period. Whenever the appellant visited her, he disrobed her and committed rape upon her for 2 months. The appellant also threatened her not to divulge about the incident and as she was under such threat, she did not disclose about the incident. After some days, her married sister noticed her bulging abdomen and brought a pregnancy test kit from the local chemist and on examination, her pregnancy was detected. She then informed her mother that the appellant had

impregnated her. The appellant stopped visiting her house after this case was lodged against him. After the lodgement of the FIR, the Police forwarded her for medical examination and for recording her statement. In the month of March/April, she gave birth to a still-born baby. She never went to any school in her life and so, she affixed her thumb impression on her statement.

17. Close on the heels of the evidence of PW-2 and PW-3, the victim's elder sister-'Z' deposed as PW-5 that the appellant resides near her parental home. On 08.12.2018, she visited her parental home and noticed some prominent changes on her sister's appearance. She confronted her sister, who informed her that the appellant had impregnated her. Her sister also informed her that the appellant was having illicit relationship with her since the month of July, 2018. The appellant threatened her with dire consequences and forbade her from divulging about the assault

18. PW-5 further deposed that she brought one pregnancy test kit from a pharmacy and she could confirm that her sister was pregnant. She then informed her parents about her sister's pregnancy. On the following day, her mother lodged an FIR with the Police.

19. The victim's father-say 'B' deposed as PW-4 that the appellant is his

next door neighbour. His daughter's age, at present, is 16 years. On 08.12.2018, he noticed apparent physical changes on his daughter's appearance and asked his wife about the reason, but as his daughter did not react to his wife's queries, they summoned their elder daughter ('Z'). Their elder daughter could unearth that the appellant impregnated his younger daughter and then, his wife lodged an FIR with the Police. The evidence of the witnesses, PWs-2, 4 and 5, are corroborating. They were cross-examined in extenso, but no contradictions could be elicited as per Section 145 of the Indian Evidence Act, 1872 (The Evidence Act, for short) qua Section 162 CrPC.

20. In her cross-examination, PW-2 has admitted that she procured the birth certificate of the victim, a few days prior to the incident. PW-3 (victim) has admitted that her mother tutored her to state before the Police that she was born on 18.07.2003. Although she never went to school, she stated before the Police that she studied up to Class-1, on being tutored by her mother and her mother told her to name the accused/appellant. She further mentioned in her cross-examination that her statement to the Police and the Magistrate was according to the narrative of her mother (PW-2). She gave birth to a still-born baby at Pinewood Hospital Tinsukia. In the same cross-

examination, the victim again stated that in fact, she did not give birth to a still born baby, but she gave birth to a boy and immediately after his birth, her son was taken away and given to someone else. She has admitted in her cross-examination that her mother disliked the appellant, but she was not aware as to why her mother disliked the appellant. This witness has, however, denied that her mother lodged a false case against the appellant as her mother disliked the appellant.

21. Highlighting the cross-examination of PW-3, learned counsel for the appellant laid stress in his argument that no DNA test was conducted to ascertain the paternity of the child. It could not be ascertained from the cross-examination of the PW-2, whether the child died or whether PW-2 gave birth to a still-born child. PW-2 has vacillated by stating that she gave birth to a still-born child and thereafter, again by stressing that she gave birth to a son, who was immediately taken away after his birth. However, PW-2 and PW-5 have categorically stated that the victim gave birth to a still-born child.

22. PW-2 deposed that her daughter gave birth to a still-born daughter, whereas PW-4 has stated that her sister gave birth to a still-born child. She has not mentioned whether the child was a boy or a girl, whereas on the

contrary, the victim herself deposed that she gave birth to a male child.

23. Now, the core question is whether the statement of the victim can be rejected, owing to the contradictions in her evidence-in-chief vis-à-vis her cross-examination.

24. The MO, Dr Ashma Z H Ghaznavi, deposed as PW-1 that on 10.12.2018, while working as Senior MHO, at Doomdooma FRU, at about 10:30 am, she examined 'X' in connection with this case. The victim stated that she had frequent sexual relationship with her cousin, Tapan Kachari, as a result of which, she became pregnant. The victim was well oriented and on physical examination, no injury was noticed on her person as well as on her private parts. The USG reveals a live foetus of 26 weeks 4 days.

25. The poignant point is whether the victim is a reliable witness. There is not even an iota of doubt that the victim has vacillated from her evidence-in-chief, when she was cross-examined by the defence. Can the victim be held to be a sterling witness. It has been held by the Hon'ble Supreme Court in ***Rai Sandeep @ Deepu –Vs- State (NCT of Delhi) and other appellants and respondents***, reported in **(2012) 8 SCC 21**, that-

“22. In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ‘sterling witness’ whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

26. The appellants, Rai Sandeep and Hari Singh were acquitted from the charges of the offence under Section 376 (2) (g) of the IPC and were set at liberty.

27. In the instant case, the victim's vacillating evidence has shaken the basic foundation of the prosecution case. Although no contradictions could be elicited as per Section 145 of the Evidence Act, vis-à-vis Section 162 of the CrPC, through cross-examination of victim's mother and sister, yet the vacillating statement of the victim casts a shadow of doubt over the entire prosecution case. Moreover the victim's version in her cross-examination did not consistently match the version of the other witnesses. She has failed to withstand the test of cross-examination.

28. Learned counsel for the appellant has stated that the birth certificate was procured in the year 2018, on 31.03.2018. It is argued that the victim has given her age as 17 years when her statement was recorded under Section 164 CrPC (Exhibit-5), whereas on the contrary, her birth certificate reveals that she was 15 years at the time of the incident and the date of birth of the victim, according to the birth certificate, is 17.04.2003.

29. Learned counsel for the appellant has relied on the decision of this Court in ***Manirul Islam –Vs- State of Assam & Another;*** reported in **2021 (3) GLT 128**, wherein it has been observed that-

“28. A Birth Certificate issued by the Health Department of the State

Government is a part of the public record. Section 35 of the Evidence Act, 1872 deals with relevancy of entry in public record which reads as follows :- “35. Relevancy of entry in public record [for an electronic record], made in performance of duty.—An entry in any public or other official book, register or record [for an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record [for an electronic record] is kept, is itself a relevant fact.”

29. From a plain reading of Section 35, it would be apparent that an entry made in any public or other official book/register or record is required to be proved by a public servant who had made the entry in discharge of his official duty or by any other persons, in performance of his duty, especially enjoined by law. In the instant case, as noted above, no such officer of the department was summoned by the prosecution as a witness to prove Ext-A.

30. It also appears from Ext- A, that the subject (victim) was born on 25/08/2001 but the Birth Certificate was issued on 12/07/2012 i.e. after a period of almost 11 years. As per Section 13(3) of the Registration of Births and Deaths Act, 1969, any birth or death which had not been registered within one year of its occurrence, can be registered only on an order made by a Magistrate of the First Class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of prescribed fee.”

30. The learned counsel for the appellant has submitted that the birth

certificate of the victim which was eventually procured after fifteen years was not properly issued in compliance to the norms. Moreover, the certificate was not properly exhibited in violation of the decision of this Court in ***Manirul Islam's case (supra)***.

31. On the contrary, the learned Additional Public Prosecutor has highlighted the paragraph-27 of the same judgment in ***Manirul Islam's case (supra)***, wherein it has been observed that-

“27. From a close scrutiny of the materials available on record, we find that Ext-A is the photocopy, compared with original, of the Birth Certificate issued by the Department of Health Services, Govt. of Assam, certifying that the accused was born on 25/08/2001. This certificate was apparently seized by the IO in presence of two seizure witnesses, viz. Usman Gani and Habibur Rahman. However, none of the seizure witnesses have been examined by the prosecution during the course of the trial. The Birth Certificate (Ext.-A) was, in fact, exhibited by the informant (PW-1), who is the uncle of the victim. The prosecution had neither examined the parents of the prosecutrix nor called any official from the Health Department so as to prove the contents of Ext-A. There is also no explanation for not doing so.”

31.1. Highlighting paragraph-27, the learned Additional Public Prosecutor has submitted that this birth certificate was proved by PW-2 as Material Exhibit-1, i.e., the mother of the victim and thus, this birth certificate has validity as evidence and it proves that the victim was below 18 years of age at the time of the incident and she cannot be held to be a consenting party. It is

submitted that the birth certificate was seized from the victim's mother who has exhibited the same.

32. Refuting this argument, the learned counsel for the appellant emphasized through his argument that the witness, PW-2 was extensively cross-examined by the defence and she has admitted in her cross-examination that she had procured the birth certificate, a few days prior to the incident. For procuring the birth certificate of her daughter, she had given a certificate issued by the Gaonburah. Relying on this certificate, the birth certificate was issued by the authority. Thus, the birth certificate M.Ext.1 is not a valid document.

33. It is further submitted by the learned counsel for the appellant that on the basis of a certificate issued by the Gaonburah, the birth certificate was prepared by the registering authority, 15 years after the birth of the victim, which renders the birth certificate inadmissible in evidence, as per the decision of this Court in ***Manirul Islam's case (supra)***.

34. I find force in the argument of the learned counsel for the appellant. The M.Ext.1 was prepared after 15 years, that too, on the basis of a certificate issued by the Gaonburah. Thus, the age of the victim is in the

dark. The victim was not sent for ossification test, as according to the MO, PW-1, the victim was pregnant at that particular point of time. It cannot be ignored that the victim gave her age as 17 years when her statement under Section 164 CrPC was recorded.

35. Learned Additional Public Prosecutor has relied on the decision of the Hon'ble Supreme Court in ***Nirmal Premkumar –Vs- State Represented by Inspector of Police;*** reported in **(2024) 3 Supreme 137/(2024) 0 Supreme (SC) 218**, wherein the earlier decision of the Hon'ble Supreme Court in ***Rai Sandeep @ Deepu's case (supra)***, has been discussed and reiterated.

36. Learned counsel for the appellant has also relied on the decision of the Hon'ble the Supreme Court in ***Santosh Prasad @ Santosh Kumar –Vs- The State of Bihar;*** reported in **AIR 2020 SC 985**, wherein it has been held that-

“5.4.3 In the case of Krishna Kumar Malik v. State of Haryana (2011) 7 SCC 130, it is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

5.5 With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?

6. In view of the above and for the reasons stated above, the appeal is allowed. The impugned judgment and order of conviction and sentence passed by the learned trial Court and confirmed by the High Court are hereby quashed and set aside. The appellant is acquitted from all the charges levelled against him and he be set at liberty forthwith, if not required in any other case.

37. Reverting back to this case, I would like to reiterate that the victim's mother-'Y' testified as PW-2 that her daughter gave birth to a still-born girl and her sister-'Z' deposed as PW-5 that the victim gave birth to a still-born child. The victim deposed in her evidence-in-chief that she gave birth to a still-born baby. The sex of the baby was not mentioned by PW-2 and PW-5 in their evidence-in-chief, but later PW-3 rebutted the entire evidence through her cross-examination. Her cross-examination is reflected hereinbelow verbatim-

"I do not remember the date of my birth. My mother told me to state before police that I was born on 18/04/2003. Although, I never visited any school in my life, on being told by my mother, I stated before police that I studied up to class I. Prior to the detection of my pregnancy, I never informed my mother or any other, relating to the acts of the accused. My mother told me to tell the name of the accused. On being

tutored by my mother, I had given my statement to police and in the court. I delivered the still-born baby at Pinewood Hospital, Tinsukia. In fact, I did not give birth to a still-born baby; actually, I gave birth to a live male child and after the birth, I gave away the child to someone else. It is not a fact that the accused never committed any sexual intercourse with me. After detection of my pregnancy, I had my blood test by a Doctor at Bordirak.

The accused Tapak Kachari is a married man, having his wife and children. Since prior to the occurrence, my mother disliked the accused, but I do not know the reason for the said disliking. It is not a fact that since my mother disliked Tapan Kachari, she has filed this false case against him.”

38. Thus, the cross-examination of the victim casts a shadow of doubt over the veracity of the evidence of her mother, i.e., the complainant. Her cross-examination also negates her evidence-in-chief. It is thereby held that a benefit of doubt has to be extended to the appellant. The IO, Bikash Jyoti Deka, is a formal witness and he deposed as PW-6 that on receipt of the FIR on 09.12.2018, he was entrusted to investigate this case. He recorded the statement of the complainant and the victim in the Police Station, in presence of WHG Surabhi Gogoi and he forwarded the victim for medical examination. He visited the place of occurrence (PO, for short) and prepared the sketch map, marked as Exhibit-4 and recorded the statements of the witnesses. He arrested the appellant and forwarded him to jail. He forwarded the victim to the Magistrate for recording her statement. He has identified the statement

of the victim as Exhibit-5. He has proved the Seizure List, relating to seizure of the birth certificate as Exhibit-6 and his signature on the seizure list as Exhibit-6(1). He submitted charge sheet against the appellant under Section 376 (3) IPC, read with Section 6 of the POCSO Act. He has proved his signature on the charge sheet as Exhibit-7 (1).

39. Learned counsel for the appellant further laid stress in his argument that the victim's evidence-in-chief reveals that she was impregnated by the appellant in the summer month, whereas she chose not to disclose about the incident. On the contrary, her earlier statement under Section 164 CrPC, recorded on 10.12.2018, reveals that the appellant has been visiting their house for the last 2 months and in the absence of her parents he had been having sexual relationship with her frequently. This indicates that the appellant must have impregnated the victim in the month of October, which is not at all possible, as the victim's gestation period was found to be above 26 weeks by the MO (PW-1). Further, it is also argued that the victim has given her age as 17 years, when her initial statement under Section 164 CrPC was recorded.

40. Learned counsel for the appellant has highlighted Exhibit-5, i.e., the

statement of the victim identified by the IO.

41. Learned Legal Aid Counsel, Mr J Das, appearing for the respondent No. 2, has submitted that the statement of the victim cannot be identified by the IO as he has not recorded her statement

42. In the wake of the foregoing discussions, it is held that the victim is not a sterling witness. Paradoxes play as her evidence-in-chief is contradictory to her cross-examination. It is thereby held that the appellant deserves a benefit of doubt. It would be perilous to hold the appellant guilty of the offence of rape based on the vacillating statement of the victim. The factum that the victim kept mum about the pursuits of the appellant until her body started revealing tell tale signs cannot be ignored. The appellant thus, deserves a benefit of doubt. As the prosecution has failed to prove this case beyond a reasonable doubt, the presumption under Section 29 and 30 of the POCSO Act does not operate against the appellant. The appellant is thereby acquitted from the charges under Sections 376(3) IPC, read with Section 6 of the POCSO Act, on benefit of doubt and is set at liberty forthwith, if not required in any other case.

43. The Criminal Appeal stands allowed.

44. However, keeping in view the provisions of Section 437-A Cr.P.C./481 BNSS, the accused appellant is directed to furnish a personal bond in the sum of Rs. 40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months.

45. Send back the Trial Court Record.

JUDGE

Comparing Assistant